Supreme Court, U. S.
FILED
NOV 15 1978
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-441.

ALLIED INTERNATIONAL PRODUCTS, LTD.,
PETITIONER,

v.

TEXTRON INDUSTRIES, INC.,
RESPONDENT.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Questions Presented.

1. Is certiorari warranted to review a discretionary ruling that is limited to one set of facts, affects no one beyond the two litigants, follows agreed-upon principles of law, and, in any event, is abundantly supported by the record?

2. Is certiorari warranted in such a case solely because one of the litigants is a foreign corporation?

3. Is certiorari warranted in such a case solely because on a motion defendant's counsel and the District Court first misread one of the plaintiff's telexes, but when plaintiff's counsel

immediately clarified the point before the District Court, when in addition the District Court heard plaintiff's motion to reargue based upon that point and issued a new opinion correcting the point, when the Court of Appeals likewise reviewed the precise point on substantially the same arguments as made here, and, in any event, when the point was one of minimal factual and no legal significance?

Chronological Statement of the Case.[1]

JUNE 6, 1964

Plaintiff Allied and defendant Textron signed a Collaboration Agreement.

DECEMBER 22, 1965

Textron terminated the Collaboration Agreement because of Allied's breaches and nonfulfillment of certain essential terms and conditions.

DECEMBER 17, 1971

Six years later[2] Allied filed a complaint in the United States District Court for the Southern District of New York (plaintiff's counsel: Baker, Nelson & Williams) against Textron and various individuals (defendants' counsel: Cravath, Swaine & Moore).

[1] In the interest of minimizing duplication and of pinpointing significant points in context, we will comment by footnote on certain events in the chronology.

[2] In these intervening six years, Allied was litigating in Indian courts against Indian government agencies over whether Allied had met certain preconditions to the collaboration project (1st Cir. App. 21-22).

FEBRUARY 8, 1972

Allied filed an amended complaint demanding specific performance of the 1964 Collaboration Agreement and $3,000,000 damages. Allied through its counsel, Robert E. Meshel of Baker, Nelson & Williams, made a settlement proposal. Textron made a counter-proposal. Allied rejected the counter-proposal (1st Cir. App. 13).

MAY 18, 1972

By letter Meshel asked the Honorable Milton Pollack, D.J., for a three-week delay before going forward with the case, in which to explore possible avenues of settlement (1st Cir. App. 40).

JUNE 16, 1972

Meshel again advised the court that the parties were exploring settlement "prior to the defendant submitting a formal answer" and of delay in transmitting a settlement proposal to Allied (1st Cir. App. 42).

NOVEMBER 20, 1972

Norman Itzkoff, with the Cravath firm, told Meshel that the defendants intended to move to transfer the action to the District of Rhode Island. Meshel asked Itzkoff to postpone making that motion to afford plaintiff's attorneys an opportunity to see whether the case could be settled and, if it could not be settled, whether Allied would agree to drop the individual defendants as parties. "Accordingly, *by consent of the parties*, the defendants' time *to move against or answer* the complaint was extended 'until 10 days after notice of the Court's action on a motion to transfer' by order of this Court

dated November 20, 1972" (Itzkoff affidavit of August 16, 1974, 1st Cir. App. 13) (emphasis supplied).[3]

JANUARY 29, 1973

Meshel by letter reported the status of the case to Judge Pollack, saying that since filing the complaint he had been conferring with defendants' attorneys about settlement, requesting additional delay to consult with his client, asking the court's indulgence for further time, and assuring Judge Pollack that in February 1973 he would "immediately proceed ahead [*sic*] with the litigation of this case" (1st Cir. App. 44).

MAY 31, 1973

Textron offered a second settlement proposal, to which it never received a response (1st Cir. App. 13-14).

JULY 6, 1973

Itzkoff received a telephone call from Meshel saying that Meshel was leaving Baker, Nelson & Williams and that *O. Taft Nelson of that firm was taking over the case; "that Baker, Nelson & Williams had never received a fee from plaintiff";*[4]

[3]Itzkoff submitted this affidavit in the District Court for the Southern District of New York. Allied has never contradicted or attacked these statements, and there is nothing in the record to indicate that postponement of defendants' answer came about other than at Allied's request and with the explicit approval of Judge Pollack.

[4]Allied states (petition, p. 3) that nothing in the record substantiates the statements of defendant's counsel (1st Cir. App. 61) and of the court (1st Cir. App. 139, 168) that Allied changed lawyers because, apparently from the record, the Baker firm had not been paid. Allied is wrong. These statements were based on Itzkoff's affidavit of August 16, 1974, which very much was in the record. Defendants repeatedly relied on it on the motions in New York and Rhode Island. But Allied never rebutted it. Not until Sinha's affidavit of June 19, 1977, submitted on Allied's motion to vacate the dismissal, does

and that a letter concerning settlement had been sent to plaintiff to which he expected a response within approximately two weeks. This telephone call was the last communication from plaintiff's first set of New York attorneys (1st Cir. App. 14) (emphasis added).

DECEMBER 10, 1973

Allied retained Rich, Krinsley, Poses, Katz & Lillienstein as substituted attorneys by retainer agreement consisting of three letters: (1) Norton I. Katz, Esq., letter to D. N. Sinha (1st Cir. App. 131-133), (2) D. N. Sinha letter to Norton I. Katz, Esq. (1st Cir. App. 134), and (3) Norton I. Katz, Esq., letter to Oriental Industries, U.S.A., Inc., signed by Harlan W. Graham of Oriental Industries, U.S.A., Inc. (1st Cir. App. 135), all dated December 10, 1973. In Sinha's letter to Katz forming plaintiff's acceptance of the retainer agreement, Sinha said: "I accept the same subject to the approval of the Reserve Bank of India, without which no remittance could be made by us. We expect that this approval would be granted to us within six (6) to eight (8) weeks. *In the event of our not getting the permission to pursue with [sic] this case within that time, we would request you to withdraw our claim and send us your bill*

Allied state it had paid the Baker firm (1st Cir. App. 154-155). The court did not have to credit this statement, especially in light of Allied's clear and protracted failure to pay its second counsel, Norton Katz, and its own admission that it needed Bank of India approval to get funds out of India and had not gotten that approval as of September 24, 1974, almost a year after the Baker firm withdrew (1st Cir. App. 30, 134). Nor did the court have to credit Sinha's further statement in his June 19, 1977 affidavit that the Baker firm withdrew because the trial attorney working on the case had left and they were not then staffed with trial counsel who could undertake the case. O. Taft Nelson of the Baker firm in his affidavit of December 12, 1973 (1st Cir. App. 8-9), states that Meshel, who left, was the litigating partner, but adds that he (Nelson) suggested Sinha get new counsel since he (Sinha) refused to accept the settlement negotiated and recommended by the Baker firm!

thereafter, which will be settled by us on its receipt"[5] (1st Cir. App. 134) (emphasis added).

DECEMBER 13, 1973

Newman, Rich, Krinsley, Poses, Katz & Lillienstein substituted as Allied's counsel by consent stipulation (1st Cir. App. 6-7). This stipulation was not served on defendants' counsel until July 12, 1974, seven months later (1st Cir. App. 14).

JULY, 1974

Allied's New York collaborator advanced funds enabling Allied's substituted counsel to proceed under the retainer agreement; the collaborator states that these funds were advanced for its, not Allied's account. As of April 6, 1977, Allied's counsel had received no funds from any source for services rendered after December 31, 1975 (1st Cir. App. 121, 124; 30).

JULY 12, 1974

Defendants' counsel learned for the first time that the Rich, Krinsley firm had become substituted counsel for plaintiff (in a letter advising that Judge Pollack had scheduled a pretrial conference). That was the first communication from either of plaintiff's counsel since July 6, 1973 (1st Cir. App. 14).

AUGUST 16, 1974

Defendants moved for an order (1) dismissing the action for want of prosecution, (2) dismissing the action as against certain individual defendants for insufficiency of service of process, (3) dismissing the action as against all defendants for lack of personal jurisdiction, (4) dismissing the action against certain individual defendants for improper venue, or, alternatively, (5) transferring the action to the District Court of Rhode Island (1st Cir. App. 10-11).

[5] Allied's petition does not mention this condition of the retainer agreement.

SEPTEMBER 27, 1974

D. N. Sinha executed an affidavit to support plaintiff's objection to defendants' motion to dismiss or transfer the case. Explaining plaintiff's failure to prosecute the case up to that time, he blamed the Reserve Bank of India for plaintiff's inaction, indicated imminent approval of funds, and promised diligent prosecution of the lawsuit (1st Cir. App. 30).

OCTOBER 15, 1974

Judge Pollack transferred the action to Rhode Island.

NOVEMBER 25, 1974

Defendants renewed their various motions to dismiss for want of prosecution, for insufficiency of service of process, for lack of personal jurisdiction, and for improper venue (1st Cir. App. 32). Textron's present counsel filed a notice of appearance.

NOVEMBER 26, 1974

Peter Lawson Kennedy, Esq., of Providence, R.I., filed a notice of appearance as local counsel for Allied.

MAY 16, 1975

Judge Edward W. Day dismissed the complaint as to individual defendants but denied defendant Textron's motion to dismiss for failure to prosecute.[6]

JUNE 17, 1975

Answer to amended complaint filed.

OCTOBER 1, 1975

The District Court (Day, J.) issued notice that it would call the case on October 21, 1975, which if answered ready would be placed on the continuous jury trial calendar to commence October 22, 1975.

OCTOBER 21, 1975

Allied did not call the case ready at the calendar call and it was passed.

DECEMBER 17, 1975

Allied's Providence counsel noticed the deposition of Textron's Chairman, G. William Miller.

[6]Judge Day misconceived the record when he said that for 2½ years Judge Pollack had enlarged the time to answer at defendants' request so that both parties contributed to the delay. As seen, Allied had asked defendants to withhold their motion to transfer to explore settlement, and had consented to an order enlarging the time to answer until after the decision on the transfer motion. *See* events of November 20, 1972, *supra* and footnote 3. If Allied had wanted to be relieved of its agreement that defendants need not answer, it could have so moved. The record shows that although Allied asked for the time to explore settlement, it did not respond to defendants' offers. For all defendants knew, Allied had abandoned its case. For Allied now to try to pin any delay much less the entire delay until answering on defendants (petition, p. 13, fn. 8) boils down to an argument that a defendant must keep alive a meritless law suit he has good reason to believe a plaintiff has abandoned.

JANUARY 20, 1976

Allied's New York counsel takes Miller's deposition, the only discovery by Allied.[7] (As of April 6, 1977, Allied had not paid its New York counsel for services in connection with that deposition.) (1st Cir. App. 124.)

AUGUST, 1976

Allied's New York counsel insisted that D. N. Sinha come to New York to discuss payment of fees (1st Cir. App. 124). Until that time, New York counsel had the impression from letters and conversations with plaintiff that the Reserve Bank of India had approved the retainer agreement (1st Cir. App. 122). It learned at this August 1976 meeting, for the first time, that the Reserve Bank of India had approved only a modified version of

[7]Allied makes several odd procedural points. It suggests Textron delayed the case by not filing G. William Miller's deposition until 5½ months after it was taken (petition, p. 9). Allied does not state when Miller received the deposition, but in any event Fed. R. Civ. P. 30(e), (f) provides that if a witness does not sign a deposition within 30 days after he receives it, the officer taking the deposition shall sign it and file it. (Contrary to Allied's suggestion, petition, p. 5, the parties do not file depositions.) Apparently sheepish about its sparse discovery (one deposition in five years), Allied comments that it was not required to conduct discovery and was wholly free to try its case without extensive discovery (petition, p. 13, fn. 8). Allied says this to this Court, but it said quite the opposite below — Allied told the District Court and its counsel that it wanted discovery (1st Cir. App. 97-98, 116, 161-162). Finally, Allied suggests Textron delayed the case by not filing its answer and moving that the case be placed on the trial calendar. As mentioned, if at any time Allied wished to have been relieved on the consent order, which it instigated, postponing defendants' time to answer until after determination of the motion to transfer, Allied could have so moved. And in Rhode Island cases go onto a calendar automatically, and proceed toward the top. When Judge Day called his calendar, Allied did not mark the case ready. When Judge Pettine began to ask for pretrial memoranda, Allied sought postponements. Plaintiff's attempt to metamorphose its colossal lack of interest in trying its case into delay by the defendants beggars credulity.

the retainer agreement (1st Cir. App. 125). Whereupon, New York counsel advised Sinha that Allied must pay its fees under the original retainer agreement or under the approved modification, or seek other counsel. Sinha left that meeting assuring New York counsel of payment, but as of April 6, 1977, New York counsel had received no payments (1st Cir. App. 124-125).

OCTOBER, 1976

Allied's New York counsel notified Allied that it must obtain other counsel (1st Cir. App. 126).

OCTOBER 14, 1976

The court offered to hold a settlement conference if the parties thought it might be effective and, if not, requested that "*plaintiff's counsel prepare and forward to me an order requiring close of discovery within three weeks from the date of this correspondence with pre-trial memoranda to be submitted one week thereafter.*" (1st Cir. App. 52.) (Emphasis in original.) Allied never submitted this pretrial order.

NOVEMBER 11, 1976

The District Court issued its standard preliminary pretrial order — ordering that pretrial discovery be closed by January 3, 1977, and that the parties submit pretrial memoranda by January 10, 1977, and stating that enlargement of any of these deadlines would not be granted unless requested by motion for good cause on or before November 29, 1976 (1st Cir. App. 54).

NOVEMBER 19, 1976

Allied's New York counsel notified Allied and Allied's New York collaborators of the pretrial order, by letter stating that it

enclosed the order and indicating a need for immediate action, given the ordered time schedule, to avoid "dismissal of the action" (1st Cir. App. 156, 126).[8]

DECEMBER 3, 1976

Textron served interrogatories on Allied (*see* 1st Cir. App. 56).

DECEMBER 15, 1976

Allied's New York counsel advised Allied and its collaborator of interrogatories, by letter stating it enclosed the interrogatories and advising of the need for immediate action by New York counsel or new counsel (1st Cir. App. 159, 126).

JANUARY 11, 1977

The District Court granted Allied's January 10, 1977, *ex parte* motion filed by its Providence counsel for an enlargement of time within which to file pretrial memoranda up to and including January 24, 1977 (1st Cir. App. 55).

JANUARY 19, 1977

Textron moved to compel answers to its interrogatories (1st Cir. App. 56).

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[8]There is no dispute that Allied's counsel in both New York and Rhode Island received this pretrial order. Allied's New York counsel says it sent the order to Allied in India and to Allied's collaborator in New York. Allied says it never received it. At one point, defendant's counsel misread one of Allied's telexes to be an admission that it had received this pretrial order in India. That telex actually referred to the October 14, 1976, letter from the District Court. As will be seen, counsel's mistake was brought to the court's attention, the court considered it and adhered to its decision.

JANUARY 24, 1977

Textron filed its pretrial memorandum in accordance with the enlargement granted on January 11, 1977.

JANUARY 25, 1977

Textron moved under Rule 41(b) to dismiss the action on the record of Allied's failure to prosecute and failure to comply with Rule 33 (1st Cir. App. 58).

JANUARY 28, 1977

Allied moved by its Providence counsel for an additional extension of twelve weeks within which to file its pretrial memorandum (1st Cir. App. 59).

FEBRUARY 3, 1977

Textron filed an objection to Allied's motion for further enlargement.

MARCH 7, 1977

A hearing was held before the Honorable Raymond J. Pettine on Allied's motion for a second enlargement for filing of its pretrial memorandum, Textron's objection thereto, and Textron's motions to dismiss for failure to prosecute and to compel answers to interrogatories. Allied's Providence counsel represented Allied at the hearing (1st Cir. App. 61-68).[9]

MARCH 8, 1977

The court entered its order requiring Allied to file a meaningful pretrial memorandum and meaningful answers to Tex-

[9] Allied focuses its complaints on this hearing. We will deal with them in the argument.

tron's interrogatories by March 17, 1977, and holding Textron's motion to dismiss in abeyance for consideration after March 17, 1977 (1st Cir. App. 69).

MARCH 17, 1977

Deadline date. Allied failed to file its pretrial memorandum and answers to interrogatories. (The docket entries show that neither of these documents were ever filed.)

MARCH 22, 1977

An order was entered dismissing the action with prejudice (1st Cir. App. 72).

APRIL 4, 1977

Allied's New York counsel received a night letter from Allied threatening them with liability for counsel's noncompliance with the court's order although counsel had "all material facts" with them. New York counsel later received a telegram dated April 5, 1977, addressed to Allied's Rhode Island counsel, saying that its New York lawyers had not complied with the court's November pretrial order and threatening "serious consequences" to the New York firm (1st Cir. App. 136-137).

APRIL 4, 1977

Allied filed a notice of appeal from the March 22, 1977, dismissal order. The appeal was filed by Allied's New York counsel (1st Cir. App. 73).

APRIL 7, 1977

Textron's counsel received motions of Allied's New York Counsel for an order (1) permitting them to withdraw as attorneys for plaintiff, (2) directing Allied to obtain substitute

counsel, and (3) granting Allied reargument. The motions were accompanied by the affidavit of Norton I. Katz, Esq., dated April 6, 1977 (1st Cir. App. 118-137).

APRIL 28, 1977

Allied moved in District Court to vacate the March 22, 1977, dismissal order. This motion was filed by both New York and Providence counsel (1st Cir. App. 75). The motion was accompanied by an affidavit of D. N. Sinha, dated April 27, 1977 (1st Cir. App. 77-98), stating, *inter alia*, that he was the "only one" with sufficient knowledge to answer defendant's interrogatories, that plaintiff could not comply with the court's order because he was engaged in a campaign for parliament that ended on March 17, 1977, and that, finally, he had just secured tentative approval from the Reserve Bank of India for transfer of funds to pay Allied's counsel, settling all past bills and advancing payment for services through June 30, 1977 (1st Cir. App. 94-95). The motion was also accompanied by an affidavit dated April 27, 1978, of Norton Katz, Allied's New York counsel, stating, *inter alia*, that "none of the payments which were to be received from the plaintiff had been made until today," and Sinha "has requested that we remain as counsel for the plaintiff and we have undertaken to do so" (1st Cir. App. 103-104).

APRIL 29, 1977

Allied's Providence counsel filed a request for a speedy hearing on its motion to vacate.

MAY 6, 1977

Textron filed in District Court its objection on jurisdictional grounds to plaintiff's motion to vacate.

MAY 9, 1977

Allied filed a motion in the Court of Appeals to withdraw its appeal. This motion was filed by Allied's Providence counsel.

MAY 10, 1977

Textron filed in the Court of Appeals its objection to plaintiff's motion to vacate.

MAY 17, 1977

Allied filed a motion for remand and alternative relief. This motion was filed by both New York counsel, Katz, and Providence counsel, Kennedy.

MAY 31, 1977

The Court of Appeals granted the District Court leave to consider Allied's motion to vacate (1st Cir. App. 106).

JUNE 8, 1977

Allied's third set of counsel (Joseph Cavanagh of Providence, R.I.) filed a notice of appearance, and advised the District Court by letter of June 9, 1977, about an "agreement" between Allied and its New York counsel terminating the latter's services (Resp. App. 1a).

JUNE 13, 1977

Allied's former New York counsel advised the District Court by letter that Allied's termination of its services was unilateral (Resp. App. 2a).[10]

[10] Less than two months before, Sinha had paid Katz for the first time, and asked him to continue as counsel. *See* events of April 28, 1977.

JUNE 13, 1977

The District Court entered its first memorandum and order denying Allied's motion to vacate dismissal (1st Cir. App. 138-151).

JUNE 14, 1977

Allied moved to vacate the District Court order of June 13, 1977. This motion again brought up the two-telex mistake of defendant's counsel and was accompanied by another affidavit of D. N. Sinha (1st Cir. App. 153-155), saying, *inter alia*, that delay in payment of Allied's New York attorneys was due solely to *their* failures, and attaching certain correspondence between plaintiff and its New York counsel including a January 5, 1977, telegram from Sinha to Allied's New York counsel saying with respect to Allied's answers to Textron's interrogatories:

> "FULL FACTS ALREADY WITH YOU. PLEASE SEND YOUR DRAFT REPLY TO FURNISH ANY FURTHER INFORMATION NECESSARY." (1st Cir. App. 162; *see also*, 136.)[11]

JUNE 20, 1977

The District Court entered a memorandum and order vacating its June 13, 1977, order, and substituting the same as

[11] Compare this statement with Sinha's statement in his affidavit of April 27, 1977 (1st Cir. App. 94-95), that he was the only one with sufficient knowledge to answer defendants' interrogatories! In its petition Allied stated, p. 6, fn. 5, that Allied filed answers to defendants' interrogatories on April 28, 1977, along with its motion to vacate the dismissal order of March 22, 1977. The court docket does not indicate that these answers to interrogatories were filed (1st Cir. App. 5). More revealing yet, in Sinha's affidavit of April 27, 1977, submitted on Allied's motion to vacate, he asks for further time "within which to have its counsel answer defendants' interrogatories . . ."! (1st Cir. App. 96-97.)

its ruling denying Allied's April 28, 1977, motion to vacate (1st Cir. App. 165-180).

MAY 19, 1978

The Court of Appeals for the First Circuit issued its opinion on Allied's appeal. The opinion noted six deadlines included among those ignyred by Allied, observed that any delays in procuring counsel or inaction of attorneys are chargeable to Allied, and found sufficient grounds for dismissal under either Rule 37 or Rule 41(b).

Reasons for Denying the Writ.

The petitioner asks this court to review a discretionary ruling by a district judge that has already been reviewed and affirmed by three judges of the Court of Appeals. Far from there being a conflict in the circuits, the law applied by the four judges below is well-settled and accepted as integral to the orderly administration of justice. To avoid this hard fact, the petitioner picks and chooses from the record, and occasionally goes beyond it, to insinuate impropriety by the district judge and others and to suggest the case has importance because petitioner is a foreign corporation. Based on this, the petitioner would have this court substitute its judgment on a matter of discretion for that of the District Court and the Court of Appeals, in the guise of exercising its supervisory power over the lower courts in the federal system. The record, however, cries for the summary denial of the petition.

I. Where a Case is One of a Kind, Where the Result Goes No Further than the Immediate Parties, Where there is No Conflict in the Circuits on the Law, Where Indeed the Law is So Well Settled and Accepted that Even to Grant Certiorari Would be Unsettling — in Such a Case the Court Should Deny Certiorari Out of Hand.

The District Court based its decision on the entire record in the case. The Court of Appeals based its affirmance on the entire record. Both courts applied to that record well-established principles of law about which there is no dispute.

Delays and inaction by counsel chosen by Allied are chargeable to Allied. *See, e.g., Affanato* v. *Merrill Brothers*, 547 F. 2d 138, 141 (1st Cir. 1977). Denial of Textron's first motion to dismiss lacked finality and was not law of the case. *See, e.g., United States* v. *United States Smelting, Refining & Mining Co.*, 339 U.S. 186, 199 (1950). A determination of lack of prosecution must be based on the entire procedural history of a case. *See, e.g., Richman* v. *General Motors Corp.*, 437 F. 2d 196, 199 (1st Cir. 1971). The District Court had discretion to dismiss under its inherent power "to manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases." *See, e.g., Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 630-631 (1962).

And what was the record to which the courts applied these principles of law? Allied says it is an extraordinary one. We say it is a fantastic one — five years of inaction by Allied punctuated only by its excuses and promises and by its ability not only to shuck its old lawyers in order to blame them for its own misconduct but also to inveigle its new lawyers into doing this.[18]

[18] Is it coincidence that Allied is on its fifth set of counsel?

What is the upshot? When a court applies settled law to unique facts, the decision does not reach beyond the lawsuit. For this court to involve itself in this case would have no precedential effect. No one, not even Allied, disputes the principles of law.

Furthermore, discretion, and only discretion, is involved here. For this court to review that discretion would be for it merely to adjust a dispute between the parties and to substitute its judgment for that of the District Court in the management of that court's docket. Indeed, for this court on this record even to grant certiorari would signal all District Courts to go easy on sanctions in their attempts to move cases on their docket. This would be a giant step backwards.

II. Allied's Very Attempts to Insinuate Impropriety, to Inflate the Importance of the Case, and to Blame Everybody but Itself Prove the Hollowness of its Position.

1.

Allied tried to blame defendants for the delay and lack of prosecution. The record demolishes this argument. We have already commented on the more outlandish points Allied makes in this respect. We will not repeat them except to say that Allied instigated the order postponing defendants' obligation to answer and it could at any time have moved to have been relieved from the order.

Allied pleads inconvenience because the case was transferred to Providence, thousands of miles from India and with Allied's counsel in New York. This, it says, is not easy for a litigant from another culture to understand. What on earth culture has to do with this we do not know. As another plea

for sympathy insinuating a naivete requiring special treatment and protection, it can be shrugged off. Thousands of litigants and lawyers litigate many miles away all of the time in this age of fast travel and virtually instant communication — and this includes New York lawyers in Rhode Island. Besides, Allied was an old hand at major litigation (1st Cir. App. 21-22).[13]

Of a piece with this argument, Allied tries to make the case out as delicate, touching on international relations. Allied claims to be government-owned and hints that its interests are that of the government of India (petition, p. 4, fn. 3; p. 7). There is nothing in the record about this at all. In fact, up to this point Allied has made the government of India a scapegoat. Allied had railed perennially about the failure of the Reserve Bank of India to free up funds so Allied could pay its counsel and prosecute the case (1st Cir. App. 30, 87-98, 102-105). And, very odd for a government-owned company, Allied had to sue Indian governmental agencies to get its stock registered (1st Cir. App. 83-84). But, as they say about a foolish consistency, Allied has raised the point. We submit, though, that this court will not credit the contention that for reasons of foreign policy a different set of rules apply to foreign corporations than to American litigants.

2.

In this court, as in the courts below, Allied blames its counsel for the events leading to the dismissal. By law, of course, Allied is held responsible for the acts of counsel.

[13] Sinha managed to get funds to come to the United States in April 1977 and either to stay until or to return again in June 1977 (1st Cir. App. 77-98, 153-155); and to come in September 1974 (1st Cir. App. 17-31). These occasions involved the motions to transfer and to dismiss and to vacate, proving he could get here and get funds when he wanted to.

Here, however, it is only Allied's naked say-so on a number of key points that in fact would fix blame on counsel. For example, Allied says it never got the pretrial order. Allied's counsel says he sent it to Allied and Allied's collaborator. The court had no duty to believe Sinha over Katz.

The fundamental flaw in Allied's position all along has been and is its insistence that what it says must be accepted as true, gospel in the literal sense of good news for Allied. Courts, however, have a duty to look at an entire record, weigh it, and draw inferences and conclusions. The record here abundantly supports the inferences and conclusions of the courts below.

3.

Looking at the record, Allied's insistence that defense counsel misstated the fee situation is plainly wrong. Allied says defense counsel had no basis for the statement at the March 7, 1977, hearing that Allied's first counsel withdrew apparently because it had not been paid (petition, p. 13) and cites Sinha's June 19, 1977, affidavit that Allied's first counsel had been paid in full. But, as pointed out before, there was the Itzkoff affidavit in the record (1st Cir. App. 14) to support the statement and the court's finding. To boot, the affidavit had never been rebutted though used on two previous motions, on one of which at least Sinha had submitted a subsequent affidavit. And at the hearing Allied's Providence counsel said that he and Allied's New York counsel had not been paid (1st Cir. App. 64), which Katz's affidavit of April 6, 1977, bears out (1st Cir. App. 123-125). Sinha's affidavit of June 19, 1977, whether to be credited or not, hardly could have helped the court on March 7, 1977, three months before.

4.

Allied's main argument hangs on defense counsel's admitted mistake at the March 7, 1977, hearing about which notice Allied said it had received. Kennedy, Allied's local counsel, clarified the point at the hearing (1st Cir. App. 65). He also said he represented Allied's New York counsel, Katz, and represented Allied at the hearing "for the purpose of this motion . . ." (1st Cir. App. 64).

Allied now argues that no one represented it at the hearing and that this deprived it of the due process of law. There are several answers to this.

Whatever Kennedy said, he represented Allied at the hearing and acted for it both before and after the March 7, 1977, hearing.[14] Allied does not repudiate Kennedy's other efforts. It cannot deny that he spoke up at the hearing on the crucial points. On this record Allied scarcely can say it was not represented at the hearing, much less escalate Kennedy's few words into a due process violation.

The hard fact for Allied, however, is that the court did hear Allied at length about the mistake on the notices, and about fees. The court included the mistake about the notices in its opinion on Allied's first motion to vacate. On getting the opinion, Allied's new and fourth counsel immediately filed another motion to vacate, focusing on this very mistake and the fee situation (1st Cir. App. 152-164). The court heard counsel, considered the motion, acknowledged the missake *and issued a new opinion correcting it and reaffirming the dismissal* (1st Cir. App. 167-180).

[14] He had filed a notice of appearance for Allied (1st Cir. App. 4), he had noticed G. William Miller's deposition, he had obtained an *ex parte* enlargement of time (1st Cir. App. 55), and he had moved for a further enlargement which was one of the motions heard on March 7, 1977 (1st Cir. App. 59). Subsequently, he and Allied's New York counsel moved to vacate the dismissal (1st Cir. App. 75); he requested a speedy hearing on the motion, he moved in the Court of Appeals to withdraw Allied's appeal, and he and Allied's New York counsel were to move to reargue the dismissal (1st Cir. App. 118-119).

How can Allied transmogrify the indisputable fact that it was heard on this factual point into a due process argument that it was not heard?

Recognizing that it cannot, Allied resorts to the last refuge of disgruntled suitors — the argument *ad hominum*. Piercing through the artful verbiage in its petition, at bottom Allied charges that Judge Pettine could not be objective in reconsidering his decision because defendant's counsel was "well known" to the court. Allied says that "[e]ven a court may not [have been] able to put out of its mind a charge of lying and other erroneous or inappropriate information which [had] been firmly implanted there by counsel well known to the court . . ." (petition, p. 23).

Just what is Allied insinuating? Nothing less than that Judge Pettine decided the case out of partiality to defendant's counsel!

Allied outdoes even itself in this argument. It goes outside the record to call defendant's counsel "well known," but while outside the record does not mention that Mr. Cavanagh is one of the leading and most respected trial lawyers in the state. And it studiously omits the court's expression of respect for Mr. Kennedy (1st Cir. App. 66).

It neglects to state that defendant's counsel admitted the mistake to the court (1st Cir. App. 165), but states instead that despite counsel's admission the court could not put out of its mind what defendant's counsel had previously said.

It yokes together Allied's failure to pay fees with the conceded mistake on notice, hoping by the juxtaposition that the admitted mistake on the latter would support its argument of mistake on the former. Allied never refers to the cornucopia of facts in the record about Allied's failure to pay fees.

Rather, it relies solely on Sinha's belated, self-serving assertion that fees had been paid (significantly, Sinha does not say when). In short, Allied totally ignores that the record abundantly supports what defendant's counsel and the court said about fees. In any event, the court did not have to accept what Sinha said. We have made these points before. We make them again, because for Allied to use them to support its charge of partiality is especially invidious.[15]

Of course the Court of Appeals considered all of this. But, according to Allied, the Court of Appeals "never got below the surface in its consideration of this case" (petition, p. 23). And so, the Court of Appeals also joins the list of those responsible for Allied's woes.

III. The Lower Courts were Right. Given Allied's Five-Year Record of Nothing but Excuses and Promises and Given the Extreme Prejudice to Textron to Try a Case with Fourteen-Year-Old Facts, the Lower Courts had No Alternative but to Dismiss.

The record speaks for itself about Allied's conduct. The chronology lays it out in summary form.

[15]Allied chose its New York counsel. Allied agreed with its New York counsel that it would withdraw its claim altogether if the Reserve Bank of India did not approve their fee agreement within weeks after December 10, 1973 (1st Cir. App. 134). Allied did not expect counsel to proceed without payment. Allied's Sinha knew in August 1976 — long before the District Court issued any pretrial notice or order — that its New York counsel would no longer willingly represent Allied if amounts due were not paid (1st Cir. App. 102). Allied knew urgent action was required, and knew its case was in jeopardy if it did not obtain other counsel (1st Cir. App. 103, 156-164). At one moment Allied says Sinha was the only one with sufficient knowledge to complete answers to interrogatories and pretrial memoranda (1st Cir. App. 95). Yet, at others, Allied says its New York counsel had "full facts" and "all material facts" available to them (1st Cir. App. 136, 162).

In New York, Allied conducted no discovery, filed no papers, opened settlement negotiations but did not respond to defendants' settlement offers, requested that defendants postpone their motion to transfer, prayed for Judge Pollack's indulgence in tolerating Allied's delays, assured immediate prosecution, obtained substitute counsel but did not tell defendants and, when faced with dismissal when Judge Pollack resurrected the case from limbo, submitted Sinha's affidavit blaming others for the inaction but promising diligent prosecution.

This summarizes virtually three years of Allied's activity in the case.

In Rhode Island, Allied took Miller's deposition, ignored the court's direction to prepare a pretrial order, ignored the court's own pretrial order, obtained *ex parte* a two-week enlargement to file its pretrial memorandum, failed to file its pretrial memorandum, failed to answer Textron's interrogatories, and, when faced with Textron's motion to dismiss, moved for a 12-week enlargement.

This summarizes five years of Allied's activity in the case.

Allied did nothing, but it blames everyone else — Textron, Miller, Textron's counsel, its own New York counsel, its own Rhode Island counsel, the Reserve Bank of India, Judge Pollack, Judge Pettine, and the Court of Appeals. At no time does Allied accept the slightest responsibility.

Allied has required five different courts, counting this Court, and two different judges in Rhode Island, to familiarize themselves with a complex case. The drain on the courts' resources has been enormous. Yet Allied wants to drain more of the courts' resources and, *mirabile dictu*, repeats its shopworn promise that it is prepared to go ahead with the case promptly.

And how that would prejudice Textron! The operative facts go back at least to 1964. Key Textron witnesses are dead

or gone (1st Cir. App. 36-39), including now C. William Miller, Textron's main witness. Sinha would testify knowing Textron would be hard put or unable to produce witnesses to refute him.

Discretionary dismissals for want of prosecution and non-compliance with court orders have been sustained in circumstances far less compelling than these.[16]

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GEORGE M. VETTER, JR.,
Counsel for Respondent.

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(401) 274-2000

Dated: November 15, 1978.

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[16] *See, e.g., National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976); *Link* v. *Wabash Railroad Co.*, 370 U.S. 626 (1962); *Zavala Santiago* v. *Gonzalez Rivera*, 553 F. 2d 710 (1st Cir. 1977); *Affanato* v. *Merrill Brothers*, 547 F. 2d 138 (1st Cir. 1977); *Pease* v. *Peters*, 550 F. 2d 698 (1st Cir. 1977); *Asociacion de Empleados del Instituto de Cultura Puertoriquena* v. *Rodriguez Morales*, 538 F. 2d 915 (1st Cir. 1976); *Spering* v. *Texas Butadiene & Chemical Corp.*, 434 F. 2d 677 (3d Cir. 1970), *cert. denied*, 404 U.S. 854 (1971); *Pearson* v. *Dennison*, 353 F. 2d 24 (9th Cir. 1965).

Appendix.

HIGGINS, CAVANAGH & COONEY
ATTORNEYS AT LAW
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PROVIDENCE, R. I. 02903

June 9, 1977

The Honorable Raymond J. Pettine
United States District Court
for the District of Rhode Island
Federal Building
Providence, RI 02901

Re: Allied International Products, Ltd.
vs. Textron Industries, Inc.
No. 74-257

Dear Judge Pettine:

I have filed my entry of appearance as attorney for the plaintiff, Allied International Products, Ltd. Enclosed is a copy of plaintiff's letter to Attorney Norton I. Katz in New York, confirming their agreement terminating his services.

I feel that plaintiff has a meritorious claim for substantial damages. I also feel that due to various circumstances in this case, without any fault on the part of the plaintiff, there is a serious danger of a gross injustice if plaintiff is denied a trial on the merits.

Sincerely yours,

JOSEPH V. CAVANAGH

JVC/fg
Enclosure
cc — George M. Vetter, Jr., Esq.
— Peter L. Kennedy, Esq.
— Norton I. Katz, Esq.

RICH, KRINSLY, POSES, KATZ & LILLIENSTEIN, P.C.
99 PARK AVENUE · NEW YORK, N.Y. 10016
867-7200
CABLE ADDRESS: INTAVOCAT

June 13, 1977

The Honorable Raymond J. Pettine
United States District Court for the
District of Rhode Island
Federal Building
Providence, Rhode Island 02901

Re: Allied International Products, Ltd.
vs. Textron Industries, Inc.
No. 74-257

Dear Judge Pettine:

I am in receipt of a copy of a letter addressed to Your Honor from Joseph V. Cavanagh, Esq., dated June 9, 1977, which is described as "confirming their agreement terminating his services." For the record, our services have been terminated by the plaintiff and we have been instructed to take no further action, but that termination was unilateral and not the result of any agreement.

However, we confirm the fact of the termination and are submitting a stipulation and proposed order of withdrawal to the plaintiff through Mr. Cavanagh.

Respectfully yours,

Norton I. Katz

NIK/fl

cc: Peter L. Kennedy, Esq.
George M. Vetter, Jr., Esq.
Joseph V. Cavanagh, Esq.